

2005

State of Utah v. George Lewis Alejandro : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Case No. 20050589-CA
	:	
GEORGE LEWIS ALEJANDRE,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS APPEAL IS FROM A PLEA AND SUBSEQUENT SENTENCING TO POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A THIRD DEGREE FELONY, AND ATTEMPTED FAILURE TO OBEY A PEACE OFFICER, A CLASS A MISDEMEANOR AND WAS SENTENCED A TERM OF ZERO TO FIVE YEARS AT THE UTAH STATE PRISON TOGETHER WITH A CONCURRENT ONE-YEAR SENTENCE ON THE MISDEMEANOR, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL D. LYON PRESIDING.

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UTAH APPELLATE COURTS
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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a plea and subsequent sentencing to Possession of a Controlled Substance with intent to distribute, a third degree felony in violation of U.C.A. §58-37-8(a)(iii), and Attempted Failure to Obey a Peace Officer, a Class A misdemeanor in violation of U.C.A. §41-6a-209. On June 9, 2005, the Honorable Michael D. Lyon signed an entry of judgment, sentence and commitment sentencing the Defendant to serve a term of zero to five years at the Utah State Prison together with a concurrent one-year sentence on the misdemeanor. On July 1, 2005, the Defendant filed a notice of appeal. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2a-3(2)(e)(2003).

ISSUE ON APPEAL AND STANDARD OF REVIEW

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT SENTENCED THE DEFENDANT TO PRISON?

Standard of Review: The Court must determine whether the trial court abused its discretion when it sentenced the Defendant to prison even though the offense was Defendant's first felony and first drug related offense. "A sentence will not be overturned on appeal unless the trial court has abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits." *State v. Nuttall*, 861 P.2d 454, 456 (Utah Ct. App. 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.C.A. §41-6a-209 **Obedience to peace officer or other traffic controllers -- Speeding in construction zones.**

(1) A person may not willfully fail or willfully refuse to comply with any lawful order or direction of a:

- (a) peace officer;
- (b) firefighter;
- (c) flagger at a highway construction or maintenance site using devices and procedures conforming to the standards adopted under Section **41-6a-301**; or
- (d) uniformed adult school crossing guard invested by law with authority to direct, control, or regulate traffic.

(2) (a) If a person commits a speeding violation in a highway construction or maintenance site where workers are present, the court shall impose a fine for the offense that is at least double the fine in the uniform recommended fine schedule established under Section **76-3-301.5**.

- (b) The highway construction or maintenance site under Subsection (2)(a) shall be clearly marked and have signs posted that warn of the doubled fine.

U.C.A. § 58-37-8. Prohibited acts -- Penalties.

(1) Prohibited acts A -- Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section **76-10-501** was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not

less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B -- Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section **64-13-1** or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (4)(c) who, in an offense not amounting to a violation of Section **76-5-207**:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section **76-5-207** in a negligent manner, causing serious bodily injury as defined in Section **76-1-601** or the death of another.

(3) Prohibited acts C -- Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other

identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D -- Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section **76-10-501**;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii);

(x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section **76-8-311.3**.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person

convicted under Subsection (2)(g) or this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) (i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for

use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

U.C.A. §78-2a-3(2)(e)(2003)- Court of Appeals jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

STATEMENT OF THE CASE

The Defendant was charged by information with Possession of a Controlled Substance with Intent to Distribute, a third degree felony. (R. 001). On March 23, 2005, the Defendant appeared in court and requested a preliminary hearing. (R. 005-006). On April 25, 2005 the Defendant waived his preliminary hearing, executed a statement in advance of plea and entered a plea of guilty to a charge of Possession of a Controlled Substance with Intent to Distribute, a third degree felony and to an amended charge of Attempted Failure to Obey a Peace Officer, a class A misdemeanor. The Defendant was sentenced on June 6, 2005, to a term of zero to five years at the Utah State Prison together with a concurrent sentence of one year on the misdemeanor. (R. 022-023). The sentence, judgment and commitment was signed and

entered on June 9, 2005. (R. 022-023). A notice of appeal was filed on July 1, 2005. (R. 025-027

STATEMENT OF THE FACTS

The Defendant was charged by information with Possession of a Controlled Substance with Intent to Distribute, a third degree felony and Failure to Obey a Peace Officer. On April 25, 2005, the Defendant pled guilty to the third degree felony as well as to the amended Class A misdemeanor. At the time of the plea, the trial judge asked the State what was alleged to have happened. (R. 038 / 4). The prosecutor answered,

Your honor, on the date alleged in the information, police officers received a tip that the defendant would be carrying marijuana for sale. When they attempted to pull the defendant's vehicle over, the defendant was actually a passenger in his vehicle. There's a co-defendant who was the driver. He told the driver, you know, to step on the gas, so the driver then began to evade the police. At some point the defendant bailed out of the vehicle and began running. The police officers chased him. Eventually cornered him in a laundry room of these apartments. When they arrested the defendant, they found [] in the trashcan near him four bags of marijuana totaling weight of 1884.2 grams. They were packaged in such a way that the[] officers believed, and the a quantity was such that they believed they were for distribution. The defendant admitted that he had possessed the marijuana. Admitted that he knew the police were following him and he was trying to get away. (R. 038 / 4 (sic)).

The Defendant was sentenced on June 6, 2005. During the sentencing hearing, the Defendant informed the court that he had already spent 106 days in jail.(R. 039 / 7) Defense counsel correctly informed that court that the

defendant was a young man who, while admittedly having a lengthy juvenile record, did not have any prior felony convictions in either the adult or juvenile court. (R. 039 / 2) The majority of his record consisted of substance abuse charges. (R. 039 / 2) Although Adult Probation and Parole recommended a prison sentence in the pre-sentence report, the criminal history matrix showed that the defendant fell into the category that should have resulted in a probation recommendation. (R. 039 / 2)

The trial judge responded to the defendant's request for a sentence of probation by saying:

Let me explain to you why I'm [sending you to prison]. You have a lengthy juvenile record. And as [the prosecutor] observed, you had programs there, the same programs that are offered in the adult system. You seemingly did not take advantage of them. Without missing a beat, you move right into the adult system. The adult system imposes fines and requirements as conditions of probation. You don't abide by them. There are warrants issued on a number of these cases--.... You were ordered to do something at Weber Human Services; I assume your program for domestic violence. You didn't appear. A warrant was issued, then later recalled.... You're not doing the things that indicate to the court that you are taking seriously your opportunities of probation in the adult system. And I think that the state and the probation department's observations that – that you've just been given numerous opportunities for probation and you seemingly just blow them off. (R. 039 / 6,7)

The court then sentenced the defendant to prison despite the fact that he had already served 106 days in jail awaiting resolution of the charges and in light of the fact that the criminal history matrix indicated a sentence of probation.

SUMMARY OF ARGUMENTS

The trial court abused its discretion when it sentenced the Defendant to prison. The Court should have considered the four mitigating factors outlined in *State v. Galli*, 967 P.2d 30 (Utah 1998). These four factors all work in Defendant's favor. (1) There was no "victim" who suffered an injury, (2) this was the Defendant's first felony as an adult or juvenile and his first drug related offense, (3) the Defendant expressed to the trial court his desire to put his life back in order, and (4) the court didn't consider his rehabilitative needs.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED THE DEFENDANT TO PRISON.

The sentencing decision of a trial court is reviewed for an abuse of discretion. *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1999)(per curium). This includes the decision to grant or deny probation. *See, State v. Chapoose*, 985 P.2d 915 (Utah 1999). An abuse of discretion occurs when "the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive." *State v. McCovey*, 803 P.2d 1234, 1235 (Utah

1990)(citations and quotations omitted). Furthermore, an appellate court can only find an abuse of discretion “it if can be said that no reasonable [person] would take the view adopted by the trial court.” *State v. Houk*, 906 P.2d at 909 (alteration in original)(quotations omitted).

The trial court abused its discretion in this case because it failed to consider all the legally relevant factors and it imposed an excessive sentence. Specifically, the trial court failed to consider the Defendant’s rehabilitative needs.

The Defendant pled guilty to possession of a controlled substance with intent to distribute, a third degree felony, and to attempted failure to respond to a police officer. The pre-sentence report from Adult Parole and Probation was not included with the official record; however, it is undisputed that the criminal history matrix put the defendant into a category that would result in a sentence of probation. Defendant’s attorney asked the Court to sentence the Defendant to a term that included probation together with a program to address his substance abuse problems. (R. 039/2).

The trial court did not consider the Defendant’s rehabilitative needs. Defendant’s attorney informed the court that the report (PSI) indicated the criminal history matrix put the Defendant into a probation category and the fact

that the Defendant was young, and had a substance abuse problem should guide the court to a sentence of probation.

However, the Court didn't acknowledge or address the Defendant's rehabilitative needs. It focused on the fact that the Defendant had a long juvenile record and that the few adult misdemeanor charges resulted in probation violation due to his failure to pay a fine and possibly miss a domestic violence program. There was never any acknowledgment by the sentencing court that the Defendant had a substance abuse problem, nor was there any exploration into the possibility that the failure to pay his prior fines and attend his domestic violence class was a direct result of his substance abuse problems.

These were all reasons why the Defendant should have been placed on probation and given a chance at rehabilitation

This was the Defendant's first felony conviction. These factors were apparently not considered by the trial court. In *State v. Galli*, 967 P.2d 30 (Utah 1998), the Utah Supreme Court outlined four mitigating factors that the trial court failed to consider. The Court reversed the trial courts' decisions to impose consecutive sentences. Although the Defendant in the case at bar was sentenced on just two charges, the Supreme Court's reasoning was sound and should be applied in this case to determine if there was an abuse of discretion. In *Galli*, the Supreme Court found that the trial courts abused their discretion.

“[T]he record shows that Judges Iwasaki and Rigtrup may not have given adequate weight to certain mitigating circumstances.” *Id.* at 938.

There were four factors that the trial courts failed to consider that caused them to abuse their discretion. All four factors can be applied favorably to the Defendant’s situation. The first factor was that Galli had not inflicted physical injuries on his victims. *Id.* Galli had used a gun, but it was a pellet gun that was incapable of inflicting a serious injury. *Id.* In the case at bar, the Defendant pled guilty to possessing marijuana for purposes of sale, and for attempting to flee from a peace officer. There was no “victim” who he had inflicted an injury on.

The second factor in *Galli* was that his criminal history did not support the imposition of consecutive sentences. *Id.* He had a misdemeanor theft conviction and minor traffic offenses. In the case at bar although the defendant had a lengthy juvenile record, the record was a juvenile record. The prosecutor in the case at hand argued, “I believe more telling in this case is the fact that he has a very lengthy involvement with juvenile court starting in 1994 and basically running uninterrupted over the time period that he was an adult”. (R. 039 / 3 emphasis added)

The third factor was that Galli had voluntarily confessed and admitted responsibility for his crimes. “The record suggests that he has expressed a

commitment and hope to improve himself.” *Id.* In the case at bar, the Defendant admitted to the police that he possessed the marijuana, and admitted trying to run from the police. He also informed the court that he has a substance abuse problem and wants help in trying to put his life back together. (R. 038 / 4)

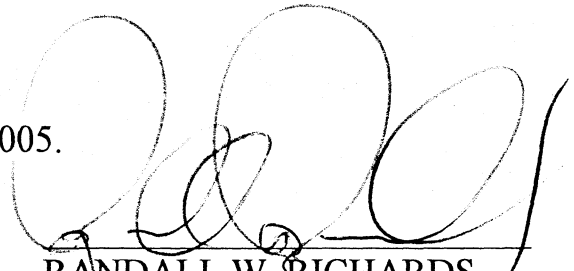
The fourth and final *Galli* factor was that consecutive sentences were not in accord with Galli’s rehabilitative needs. The Supreme Court believed that Galli’s conduct in Minnesota showed that he had the ability to improve himself and be a productive law abiding citizen. *Id.* While recognizing that the Defendant had not done everything he should while on adult probation and also that he had some problems while on juvenile probation, the Defendant never had the benefit of a drug treatment program while as an adult, with the adult sanctions motivating him to succeed.

The trial court should have considered all of the factors outlined by the Supreme Court in *Galli*. The trial court failed to consider these factors, and therefore abused its discretion when it sentenced Defendant to the Utah State prison. For these reasons, the Defendant respectfully requests this Court to remand this case back to the trial court so he can be re-sentenced.

CONCLUSION

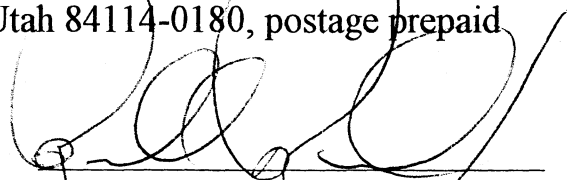
The trial court abused its discretion when it failed to consider Defendant's rehabilitative needs. The sentence was clearly excessive for a first felony conviction for possession of a controlled substance. For these reasons the Defendant respectfully requests this Court to remand his case back to the trial court to be re-sentenced.

DATED this 1 day of December 2005.


RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this 1 day of December 2005.


RANDALL W. RICHARDS
Attorney at Law

ADDENDUM A

2005 JUN -9 P 3:04

SECOND DISTRICT COURT

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 051901394 FS
	:	
GEORGE LEWIS ALEJANDRE,	:	Judge: MICHAEL D. LYON
Defendant.	:	Date: June 6, 2005

JUN 09 2005

PRESENT

Clerk: pama
Prosecutor: HEWARD, GARY R
Defendant
Defendant's Attorney(s): PDA, STATE
Agency: Adult Probation and Parole

DEFENDANT INFORMATION

Date of birth: November 19, 1981
Video
Tape Number: L6-6-05 Tape Count: 2:47

CHARGES

1. ATTEMPTED FAIL TO OBEY PEACE OFFICER (amended) - Class A
Misdemeanor
Plea: Guilty - Disposition: 04/25/2005 Guilty
2. POSS W/INTENT TO DIST CONTR/CNTRFT SUBST (amended) - 3rd Degree
Felony
Plea: Guilty - Disposition: 04/25/2005 Guilty

SENTENCE PRISON

Based on the defendant's conviction of POSS W/INTENT TO DIST CONTR/CNTRFT SUBST a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 051901394
Date: Jun 06, 2005

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The one year on count one to be served at the Utah State Prison running concurrently with the 0-5 years on count two.


SENTENCE RECOMMENDATION NOTE

The Court recommends to the Board of Pardons that the defendant be granted credit for the 106 days he has already served on this case.

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED FAIL TO OBEY PEACE OFFICER a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s)

Dated this 8 day of June, 2005.



MICHAEL D. LYON
District Court Judge

ADDENDUM B

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IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

VS.

GEORGE LEWIS ALEJANDRE,

DEFENDANT.

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VIDEO TRANSCRIPT

CASE NO. 051901394

JUL 11 2005

SENTENCING HEARING

JUNE 6, 2005

HONORABLE MICHAEL D. LYON

JUL 11 2 21 PM '05

2ND DISTRICT COURT

APPEARANCES:

FOR THE STATE:

GARY R. HEWARD

FOR THE DEFENDANT:

DEE W. SMITH

REPORTED/TRANSCRIBED BY DEAN OLSEN, CSR
2525 GRANT AVENUE
OGDEN, UTAH 84401
(801) 395-1056

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ORIGINAL 20050509-ca

1 OGDEN, UTAH

JUNE 6, 2005

2 **MR. SMITH:** NUMBER 11, GEORGE ALEJANDRE.

3 **THE COURT:** STATE OF UTAH VERSUS GEORGE ALEJANDRE. THIS
4 IS THE TIME SET FOR SENTENCING. CAN I HEAR YOUR
5 RECOMMENDATIONS PLEASE.

6 **MR. SMITH:** YES, YOUR HONOR. I'VE ALSO BEEN THROUGH THE
7 REPORT WITH THE DEFENDANT. AND IF I UNDERSTAND IT RIGHT THAT
8 WHERE HE FALLS ON THE MATRIX IS FOR PROBATION. HOWEVER, I
9 RECOGNIZE THAT A.P.&P. IS DEPARTING FROM THAT BECAUSE THEY,
10 AS I UNDERSTAND IT, DON'T FEEL LIKE HE'S A GOOD CANDIDATE FOR
11 PROBATION BECAUSE OF SOME ISSUES HE'S HAD BEFORE AND NOT
12 FOLLOWING THROUGH IN THE PAST. ON HIS BEHALF, I WANTED THE
13 COURT TO BE AWARE THAT WHILE HE HAS HAD A NUMBER OF
14 MISDEMEANORS OVER THE LAST COUPLE OF YEARS, THIS IS THE FIRST
15 FELONY, PROVIDED THAT I'M READING THAT RIGHT, THAT HE'S BEEN
16 CONVICTED OF. AND EVEN THOUGH HE'S GOT A LENGTHY JUVENILE
17 RECORD, BUT AS I LOOKED AT IT, NOT TO MINIMIZE IT, BUT IT
18 LOOKS LIKE THERE'S A LOT OF MISDEMEANORS AS I WENT THROUGH
19 IT. I MEAN HE'S HAD CONSTANT PROBLEMS, I RECOGNIZE, BUT THIS
20 IS THE FIRST TIME HE'S BEEN CONVICTED OF A FELONY. HE ALSO
21 IT APPEARS HAS, GOING BACK A NUMBER OF YEARS, STRUGGLED WITH
22 SOME DRUG CHARGES, ALCOHOL AS A MINOR. AND AS I'VE TALKED
23 WITH HIM, IT APPEARS THAT THAT IS A PROBLEM, HAS BEEN A
24 PROBLEM, AND HE RECOGNIZES THAT. WITH THAT IN MIND, WHAT
25 WE'RE ASKING FOR IS THAT YOU DEPART FROM THE RECOMMENDATION

1 FROM A.P.&P. AND CONSIDER GIVING HIM THE OPPORTUNITY TO HAVE
2 PROBATION. MAYBE WITH THE OPPORTUNITY OF N.U.C.C.C., SEE IF
3 HE COULD GET THAT TYPE OF STABILITY AND COUNSELING FOR HIS
4 DRUG PROBLEM AND SEE IF HE CAN PUT HIS LIFE IN ORDER. THAT
5 WOULD BE OUR REQUEST.

6 **THE COURT:** ALL RIGHT. THANK YOU. MR. ALEJANDRE?

7 **MR. ALEJANDRE:** YES, YOUR HONOR.

8 **THE COURT:** DO YOU HAVE ANYTHING YOU WANT TO SAY?

9 **MR. ALEJANDRE:** I WOULD LIKE A DRUG PROGRAM SO THAT -- I
10 DO GOT A DRUG PROBLEM. I AIN'T GONNA DENY IT. AND I WOULD
11 LIKE TO GET HELP. I ASKED FOR HELP. I WASN'T -- IN
12 JUVENILE, I WAS ON PROBATION, ANKLE MONITOR. I COMPLETED
13 BOTH OF THEM. SO I KNOW I CAN DO PROBATION IF I GET
14 PROBATION. BUT I WOULD LIKE HELP, TOO.

15 **THE COURT:** THANK YOU. MR. HEWARD.

16 **MR. HEWARD:** JUDGE, DEFENSE COUNSEL'S ASSESSMENT AS FAR
17 AS THE AMOUNT OF FELONIES HE'S HAD IS ACCURATE. IT APPEARS
18 HE'S NOT HAD FELONIES. HOWEVER, I BELIEVE MORE TELLING IN
19 THIS CASE IS THE FACT THAT HE HAS A VERY LENGTHY INVOLVEMENT
20 WITH JUVENILE COURT STARTING IN 1994 AND BASICALLY RUNNING
21 UNINTERRUPTED OVER THE TIME PERIOD THAT HE WAS AN ADULT
22 BECAUSE OF SOME OF THE SUPERVISION RESPONSIBILITIES THAT THEY
23 HAD. WHEN YOU GO THROUGH THE OFFENSES THAT HE COMMITTED, I
24 THINK THE MOST TELLING THING AND I THINK THE REASON THAT THE
25 DEVIATION FROM THE MATRIX IS JUSTIFIED IS THE FACT THAT

1 PROBATION IS A PRIVILEGE HE DOES NOT TAKE ADVANTAGE OF.
2 THERE ARE REPEATED DETENTION HEARINGS, REPEATED PROBATION
3 VIOLATIONS AS A JUVENILE. AND WHEN HE HITS THE ADULT SYSTEM,
4 I THINK THAT STARTING ON PAGE 8, THE PRESENTENCE REPORT LINES
5 OUT FOR YOU HOW HE HAS DONE ON EACH OF THE PROBATIONS THAT
6 HE'S BEEN GIVEN THE OPPORTUNITY FOR. AND AS FAR AS I CAN
7 TELL, ON EACH AND EVERY ONE OF THEM, HE HAS EITHER FAILED,
8 HAVING TO HAVE AN AFFIDAVIT FILED, OR ULTIMATELY TERMINATED
9 UNSUCCESSFULLY BECAUSE HE HASN'T TAKEN ADVANTAGE OF IT. AND
10 I THINK FOR SOMEBODY TO COME IN HERE AFTER BEING IN THE
11 SYSTEM, WHETHER IT BE ADULT OR JUVENILE, FOR 11 STRAIGHT
12 YEARS AND TO SAY I KNOW I HAVE A PROBLEM, I WANT TO GET HELP
13 FOR IT, I THINK IS UTTER CRAP. HE'S BEEN THERE AND ALL OF
14 THE PROGRAMS THAT ARE AVAILABLE IN THE ADULT SYSTEM, ALL OF
15 THE PROGRAMS THAT ARE AVAILABLE IN THE JUVENILE SYSTEM, IF
16 SOMEONE WANTS TO TAKE ADVANTAGE OF THEM, THEY'LL TAKE
17 ADVANTAGE OF THEM. MR. ALEJANDRE HAS SHOWN THAT HE WILL
18 VIOLATE THE LAW AND HE'S ALSO SHOWN THAT HE WON'T FOLLOW
19 THROUGH WITH WHAT THE PROBATION DEPARTMENT REQUESTS OF HIM OR
20 WHAT THE COURT REQUESTS OF HIM. AND I THINK FOR THOSE
21 REASONS, HE'S EARNED A COMMITMENT.

22 **THE COURT:** THANK YOU. LET'S PASS THE MATTER FOR A
23 MINUTE PLEASE.

24 (THE COURT HEARD OTHER MATTERS.)

25 **THE COURT:** ALL RIGHT. I'M PREPARED NOW TO RECALL --

1 **THE BAILLIF:** NUMBER 11.

2 **THE COURT:** -- GEORGE ALEJANDRE. MR. ALEJANDRE, I HAVE
3 ASKED THE CLERK TO REVIEW TO SEE WHAT YOU HAVE DONE WITH
4 RESPECT TO THE -- HOW YOU HAVE DONE ON PROBATION SINCE YOU
5 WENT INTO THE ADULT SYSTEM. THERE ARE SOME CONVICTIONS THAT
6 YOU HAVE. FOR EXAMPLE, THERE WAS A D.U.I. WHERE YOU WERE
7 ORDERED TO PAY A FINE AND DO OTHER THINGS THAT WERE ORDERED
8 BY THE COURT. I NOTE THAT YOU DIDN'T DO ANYTHING. I THINK
9 YOU PAID \$90 ON ONE CASE, BUT DID NOT TAKE CARE OF THAT
10 OBLIGATION. THAT DEBT WAS SENT TO THE OFFICE OF DEBT
11 COLLECTION.

12 **MR. ALEJANDRE:** YOUR HONOR, I DID PAY MY D.U.I. FINE. I
13 PAID THE CLASSES AND THE WHOLE 1200.

14 **THE CLERK:** I SHOW THAT AMOUNT (UNINTELLIGIBLE)
15 COLLECTION (UNINTELLIGIBLE).

16 **MR. ALEJANDRE:** BECAUSE IF NOT, I WOULD HAVE HAD A
17 WARRANT OUT ALREADY BY NOW.

18 **MR. HEWARD:** NO. WE SENT IT TO OFFICE OF DEBT
19 COLLECTION (UNINTELLIGIBLE).

20 **MR. ALEJANDRE:** I GOT THE RECEIPTS OUT --

21 **THE CLERK:** (UNINTELLIGIBLE) HE HASN'T PAID THE TOTAL.

22 **THE COURT:** HOW MUCH DID HE PAY?

23 **THE CLERK:** ORIGINAL AMOUNT DUE \$1,295. 97.42 WAS PAID
24 BY THE DEFENDANT, THEN 1,197.58 WAS SENT TO THE OFFICE OF
25 STATE DEBT COLLECTION.

1 **THE COURT:** IT IS THE SENTENCE OF THIS COURT,
2 MR. ALEJANDRE, THAT YOU BE COMMITTED TO THE UTAH STATE PRISON
3 FOR A PERIOD NOT TO EXCEED FIVE YEARS ON THE THIRD DEGREE
4 FELONY CONVICTION. ON THE CLASS A. MISDEMEANOR CONVICTION,
5 THAT YOU SERVE CONCURRENTLY ONE YEAR IN JAIL, THAT MAY BE
6 SERVED ALSO.

7 LET ME EXPLAIN TO YOU WHY I'M DOING THIS. YOU HAVE A
8 LENGTHY JUVENILE RECORD. AND AS MR. HEWARD HAS OBSERVED, YOU
9 HAD PROGRAMS THERE, THE SAME PROGRAMS THAT ARE OFFERED IN THE
10 ADULT SYSTEM. YOU SEEMINGLY DID NOT TAKE ADVANTAGE OF THEM.
11 WITHOUT MISSING A BEAT, YOU MOVE RIGHT INTO THE ADULT SYSTEM.
12 THE ADULT SYSTEM IMPOSES FINES AND REQUIREMENTS AS CONDITIONS
13 OF PROBATION. YOU DON'T ABIDE BY THEM. THERE ARE WARRANTS
14 ISSUED ON A NUMBER OF THESE CASES --

15 **MR. ALEJANDRE:** I HAD -- I WAS -- I WAS SUPPOSED TO GO
16 TO COURT LAST MONDAY, BUT I WAS IN JAIL, SO THEY NEVER TOOK
17 ME, SO I COULDN'T HELP GOING THAT ONE.

18 **THE COURT:** WELL, I'M LOOKING AT A WARRANT THAT WAS
19 ISSUED IN JULY OF LAST YEAR. RECALLED AGAIN. YOU WERE
20 ORDERED TO DO SOMETHING AT WEBER HUMAN SERVICES, I ASSUME
21 YOUR PROGRAM FOR DOMESTIC VIOLENCE. YOU DIDN'T APPEAR. A
22 WARRANT WAS ISSUED, THEN LATER RECALLED. A WARRANT WAS
23 ISSUED AGAIN IN SEPTEMBER OF LAST YEAR AND THEN RECALLED IN
24 NOVEMBER BECAUSE YOU WERE BOOKED. YOU'RE NOT DOING THE
25 THINGS THAT INDICATE TO THE COURT THAT YOU ARE TAKING

1 SERIOUSLY YOUR OPPORTUNITIES OF PROBATION IN THE ADULT
2 SYSTEM. AND I THINK THAT THE STATE AND THE PROBATION
3 DEPARTMENT'S OBSERVATIONS THAT -- THAT YOU'VE JUST BEEN GIVEN
4 NUMEROUS OPPORTUNITIES FOR PROBATION AND YOU SEEMINGLY JUST
5 BLOW THEM OFF.

6 **MR. ALEJANDRE:** YOUR HONOR, I GOT ONE QUESTION: DO I
7 GET TIME SERVED AT LEAST?

8 **THE COURT:** I WILL MAKE A RECOMMENDATION THAT YOU
9 RECEIVE CREDIT FOR 106 DAYS THAT YOU HAVE SERVED.

10 **MR. ALEJANDRE:** THANK --

11 **THE COURT:** YOU HAVE 30 DAYS IN WHICH TO FILE AN APPEAL
12 OF THIS SENTENCE.

13 **MR. ALEJANDRE:** THANK YOU, YOUR HONOR.

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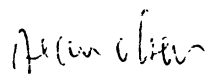
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CERTIFICATE

STATE OF UTAH)
) SS
COUNTY OF WEBER)

THIS IS TO CERTIFY THAT THE FOREGOING SEVEN PAGES OF
TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT OGDEN, UTAH THIS 5TH DAY OF JULY, 2005.



DEAN OLSEN, CSR